Dec 17 1877

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 995.

THE UNITED STATES, PLAINTIFF,

vs.

LEWIS FOX.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

407

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1 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Tuesday, the 7th day of March, in the year of our Lord one thousand eight hundred and seventy-six.

Present: The honorable Charles L. Benedict, circuit judge.

The grand jury come into court and present the following bill:

THE UNITED STATES
vs.
LEWIS FOX. } Fraudulent bankruptcy.

2 Circuit court of the United States of America for the southern district of New York, in the second circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held at the city of New York, within and for the district and circuit aforesaid, on the second Wednesday of January, in the year of our Lord one thousand eight hundred and seventy-six, and continued by adjournment to and including the sixth day of March, in the year of our Lord one thousand eight hundred and seventy-six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

3 The jurors of the United States of America within and for the district and circuit aforesaid, on their oaths present that Lewis Fox, late of the city of New York, in the county of New York, in the district and circuit aforesaid, heretofore, to wit, on the tenth day of November, in the year of our Lord one thousand eight hundred and seventy-four, resided within the jurisdiction of the United States, to wit, in the city and county of New York; and that he then and there owed debts provable in bankruptcy exceeding the amount of three hundred dollars; and said Lewis Fox also resided and carried on business in said city and county for the six months next immediately preceding the time of the filing of the petition hereinafter mentioned.

4 That on said tenth day of November aforesaid the said Lewis Fox applied by petition, subscribed and verified by him, to the honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York, he being at the time, and still is, the judge of the judicial district in which said Lewis Fox resided and carried on business as aforesaid, and that said petition was addressed to said judge, and in words and figures was as follows, to wit:

5 To the Hon. Samuel Blatchford, judge of the district court of the United States for the southern district of New York.

The petition of Lewis Fox, of the city of New York, in the county of New York and State of New York, and district aforesaid, respectfully represents:

That he has resided for more than six months next immediately preceding the filing of this petition at No. 156 Henry st., in the city of New York, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act enti-

tled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That the schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts and (so far as it is possible to ascertain) the names and places
6 of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt, within the purview of said act; and that he may be decreed to have a certificate of discharge from all his debts provable under the same.

LEWIS FOX.

FRANCIS B. CHEDSEY,
Attorney for Petitioner, 135th st., New York City,
Office No. 6, City Hall Place, N. Y.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, Lewis Fox, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief; and I do further make oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

LEWIS FOX, *Petitioner.*

Subscribed and sworn to before me this tenth day of November, A. D. 1874.

JOHN A. SHIELDS,
U. S. Commissioner, So. D. N. Y.

7 That annexed to said petition were a schedule, inventory, and valuation, in the form and manner required by sections 5014, 5015, and 5016 of the Revised Statutes of the United States, title Bankruptcy, and title 61, as by reference thereto being had will more fully appear.

That the said Lewis Fox thereupon, and on the said tenth day of November, in the year of our Lord one thousand eight hundred and seventy-four, filed said petition, schedule, inventory, and valuation in the office of the clerk of the district court of the United States in and for the southern district of New York, and also at the same time took and subscribed an oath of allegiance and fidelity to the United States in words as set out at the foot of said petition, and that said oath was thereupon and on said day filed and recorded with the said proceedings in bankruptcy.

8 And the said jurors aforesaid, upon their oath aforesaid, do further present that thereupon the said petition, schedules, inventory, and proceedings in said bankruptcy matter was referred to Edgar Ketchum, esq., one of the registers in bankruptcy of said court, to take such proceedings therein as are required by said Revised Statutes and title, and that thereupon, and on the tenth day of November, in the year of our Lord one thousand eight hundred and seventy-four, the said register adjudicated said Lewis Fox a bankrupt within the true intent

and meaning of said statutes, and made and entered an order of adjudication in form and manner as follows:

9 In the district court of the United States for the southern district of New York.

IN THE MATTER OF LEWIS FOX, BY WHOM a petition for adjudication of bankruptcy was filed on the 10th day of November, A. D. 1874, in said court.	No. 4982.	In bankruptcy.

At No. 129 Fulton street, in the city of New York, in said district, on the tenth day of November, A. D. 1874, before Mr. Edgar Ketchum, one of the registers of said court in bankruptcy, I, the undersigned, a register of said court in bankruptcy, upon good proof before me, Edgar Ketchum, taken, do find that the said Lewis Fox has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and I do hereby declare and adjudge him a bankrupt accordingly.

EDGAR KETCHUM,
Register in Bankruptcy.

(Endorsed:) No. 4982. United States district court, southern
10 district of New York. In bankruptcy. In the matter of Lewis Fox, by whom a petition for adjudication of bankruptcy was filed on the 10 day of November, A. D. 1874, in said court. Adjudication of bankruptcy upon debtor's petition. By Edgar Ketchum, register. Filed 10th November, 1874.

That thereupon, and on the fourteenth day of November, in the year aforesaid, the said Edgar Ketchum, register, being satisfied that the debts due from said Lewis Fox, the petitioner, exceeded the sum of three hundred dollars, issued a warrant, signed by him, directed to the marshal for the said southern district of New York, as a messenger, in form, manner, words, and figures as follows:

11 *Warrant to messenger. Voluntary bankruptcy.*

In the district court of the United States for the southern district of New York.

IN THE MATTER OF LEWIS FOX, BY WHOM A petition for adjudication of bankruptcy was filed on the tenth day of November, A. D. 1874, in said court.	4982.	In bankruptcy.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

To the marshal of the southern district of New York, greeting:

Whereas a petition for adjudication of bankruptcy and for relief, under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, was, on the tenth day of November, 1874, filed by Lewis Fox, of the city of New York, in the county of New York, and the State of New York, in said district, upon which he hath been found and adjudged a bankrupt, there being no opposing party thereto:

You are therefore hereby directed, as messenger, to publish twice in each of the following-named newspapers, viz, the New York Times and Commercial Advertiser (the first publication to be made forthwith), the following notice, to wit:

THIS IS TO GIVE NOTICE, That on the fourteenth day of November, A. D. 1874, a warrant in bankruptcy was issued against the estate of Lewis Fox, of the city of New York, in the county of New York, and State of New York, who has been adjudged a bankrupt on his own petition; that the payment of any debts and delivery of any property belonging to such bankrupt to him or for his use, and the transfer of any property by him, are forbidden by law; that a meeting of the creditors of the said bankrupt, to prove their debts, and to choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at No. 129 Fulton street, in the said city of New York, before Edgar Ketchum, esq., register, on the thirtieth day of November, A. D. 1874, at twelve o'clock m.

And you are further directed to serve written or printed notice forthwith, either by mail or personally, on all creditors upon the schedule filed with said bankrupt's petition, or, where names may be given you in addition thereto by the debtor, at least ten days before the appointed meeting of said court, in the following form, to wit:

To Mr. , of , county of , and State of , creditor of Lewis Fox, bankrupt:

You are hereby notified that a warrant in bankruptcy has been issued out of the district court of the United States for the southern district of New York against the estate of Lewis Fox, adjudged a bankrupt upon his own petition; that the payment of any debts, and the delivery of any property belonging to said bankrupt, to him or for his use, and the transfer of any property by him, are forbidden by law; that
12 a meeting of the creditors of said bankrupt, to wit, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden on the thirtieth day of November, A. D. 1874, at 12 o'clock m, at No. 129 Fulton st., in the said city New York, before Edgar Ketchum, esquire, register.

And have you then there this warrant, with your doings thereon.

Witness the honorable Samuel Blatchford, judge of the said court, and the seal thereof, at New York, in said district, on the fourteenth day of November, A. D. 1874.

[SEAL OF THE COURT.] GEO. F. BETTS,
Clerk of District Court for said District.

Issued by me this fourteenth day of November, 1874.

EDGAR KETCHUM,
Register in Bankruptcy.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

At New York city, on the 30th day of November, A. D. 1874, by virtue of the within warrant, I have caused the notice therein ordered to be published by advertisement twice in each of the newspapers within mentioned; the first publication of which was on the 19th day of November, A. D. 1874, in New York Times.

And I also, on the 18th day of November, 1874, sent by mail or served personally upon the creditors and others named in said warrant a copy of the notice required thereby to be sent to or served on them. And all of the said notices were according to the directions set out in said war-

rant; and none of said notices have been returned to me from the post-office.

Fees.

1. For service of warrant	$1	00
2. For necessary travel —— miles, at 5 cents per mile, each way		20
3. For each written note to creditor named in the schedule, 5 cents	2	75
4. For actual and necessary expenses in publication of notices	9	75
Copy of papers		50
Affidavit		25
	14	45 Paid.

OLIVER FISKE,
U. S. Marshal, as Messenger, Southern District of New York.

13 SOUTHERN DISTRICT OF NEW YORK, *ss:*

NEW YORK CITY, *November* 20, *A. D.* 1874.

Then personally appeared the within named Oliver Fiske, as messenger, and made oath that the above expenses returned by him, in addition to his fees, were actually and necessarily incurred and paid by him, and that the same are just and reasonable.

OLIVER FISKE.

Before me,

JOHN A. SHIELDS,
U. S. Com.

14 *Notice to creditors.*

To Mr. , of New York City, county of New York and State of New York, creditor of Lewis Fox, bankrupt:

You are hereby notified that a warrant in bankruptcy has been issued out of the district court of the United States for the southern district of New York against the estate of Lewis Fox, adjudged bankrupt upon his own petition.

[That a meeting of the creditors of said bankrupt, to wit:]

Names.	Residence.	Amount.
Solomon Kuntz	33 Eldridge street, New York City.	$275 00
H. Brash & Co	218 Church street, " " "	902 94
C. & S. Werner & Co	10 Walker street, " " "	1,522 91
Sweet, Orr & Co	338 Broadway, " " "	439 45
Henry Newman	391 Broadway, " " "	825 60
Meyer & Schwab	S. E. cor. Church & Walker sts., " " "	652 48
		245 60
Stern & Co	40 Walker street, " " "	955 75
Church & Brother	21 Walker street, " " "	112 96
L. Hass	8 Walker street, " " "	942 99
Kugh, Kupfer & Silverman	16 White street, " " "	1,660 96
A. S. Herman	21 Worth street, " " "	298 00
William Turnball & Co	55 Worth street, " " "	1,178 32
		237 10
Morritz Leipziger	216 Church street, " " "	1,050 31
H. B. Claflin & Co	Cor. Church & Worth sts., " " "	2,196 00
Charles Lewis & Brother	220 Church street, " " "	698 21
Rothschild & Heyman	325 Broadway, " " "	439 32
K. Kleinart	492 Broome street, " " "	351 00
Well Brother & Dreyfus	41 Walker street, " " "	578 17

Names.	Residence.	Amount.
Herman, Bernheimer & Son	83 Worth street, New York City.	839 57
J. Rosenthal	44 Lispenard street, " " "	579 70
		600 00
Anspach & Louis	29 Lispenard street, " " "	868 70
Whitman & Phelps	26 White street, " " "	397 41
		470 53
Julius Tolmson	43 Walker street, " " "	306 42
		74 04
Andrew Lester & Co	371 Broadway, " " "	221 65
Adolph Bernheimer	105 Franklin street, " " "	367 55
Gardner Hall, jr., & Co	59 Walker street, " " "	225 75
Isaac Feig	13 Walker street, " " "	327 25
Root & Childs	351 Broadway, " " "	496 89
Bick & Brothers	Cor. Walker and Elm sts., " " "	463 08
Leland, Allen & Bates	77 Thomas street, " " "	2,224 18
		293 90
F. Meyer & Co	32 White street, " " "	829 90
		397 68
Wolf & Co	189 Church street, " " "	565 11
Kutner & Feibel	74 Chambers street, " " "	332 95
Rhind, Grierson & Emslie	128 Church street, " " "	362 89
		229 11
Hymes Brothers	426 Broadway, " " "	516 27
Nichols, Van Vorst & Co	271 Canal street, " " "	842 51
M. Henlein & Co	189 Church street, " " "	315 13
Wolf & Levy	204 Church street, " " "	497 79
C. Rouse	15 Walker street, " " "	96 19
Seth B. Hunt & Co	114 Duane street, " " "	243 34
Upman, Tucker & Co	74 Thomas street, " " "	501 97
Schloss & Brother	336 Broadway, " " "	131 15
M. Needle	Portchester, N. Y.	17 83
		810 60
The Citizens' National Bank of New York City.	Cor. White street and Broadway, New York City.	810 60
		560 75
Leaman Fisher	Chicopee, Mass	265 00
Simon Fox	125 East Sixty-first street, New York City.	5,000 00
Denis Solomon	351 Canal street, " " "	954 00
Schoul Fishel	36 Hester street, " " "	1,250 00
Israel Cohen	164 Madison street, " " "	580 00
Jacob Friedberg	Barber, Grand Central Hotel, " " "	800 00
Adolph Lindner	156 Henry street, " " "	350 00
Simon Enock	85 Warren street, " " "	2,500 00
Robert Greenthal	857 Eighth avenue, " " "	1,100 00
G. Seiligman	20 White street, " " "	66 66
Schurer & Herman	229 Church street, " " "	51 40

to prove their debts, and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden on the 30th day of November, A. D. 1874, at 12 o'clock m., at No. 129 Fulton street, in the city of New York, before Edgar Ketchum, esq., register.

OLIVER FISKE,
United States Marshal, as Messenger,
Southern District of New York.

F. B. CHEDSEY,
Attorney for Petitioner, 6 City Hall Place, New York City.

15 The postmaster at the place to which this letter is addressed will please return it within ten days, unless called for, to

OLIVER FISKE,
U. S. Marshal, as Messenger, Southern District of New York.

16, 17 STATE OF NEW YORK,
City & County of New York, ss:

Theodore L. Peverelly, being duly sworn, saith that he is principal clerk in the office of the New York Times, a newspaper printed and published in the city of New York; that the advertisement hereto annexed has been regularly published in the said New York Times two times successively, commencing on the 19th day of November, 1874.

THEODORE L. PEVERELLY.

Sworn to before me this 20th day of November, 1874.

R. STEWART WILLIS,
Notary Public, residence Kings Co., N. Y.

OFFICE OF N. Y. COMMERCIAL ADVERTISER.

STATE OF NEW YORK,
City of New York, ss:

Edwin S. Ralphs, of the city of New York, being duly sworn, says that he is the principal clerk employed in the office of the New York Commercial Advertiser, a daily newspaper published in said city, and that the notice of which the annexed is a copy has been published in said N. Y. Commercial Advertiser on the 19th & 20th days of November, 1874.

EDWIN S. RALPHS.

Sworn to before me this 25th day of Nov'b'r, 1874.

FRE'CK N. DE WITT,
Notary Public, City & County of N. Y.

That the said marshal did thereupon give the notice required by him to be given in and by the terms of said warrant, and at the meeting held in pursuance of said notice at the office of said Edgar Ketchum, register, at No. one hundred and twenty-nine Fulton st., in the city of New York, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and seventy-four, and at which meeting the said register presided, the said marshal, as messenger aforesaid, made return of the warrant and his doings thereon, which return is fully and at large set out in the warrant hereinbefore set out, and it appears by said return that he gave the notice to the creditors as required in the warrant aforesaid.

That thereupon and on said thirtieth day of November, in the year of our Lord one thousand eight hundred and seventy-four, in presence of said register designated by the court, the creditors of said Lewis Fox, who had proved their debts in said matter, proceeded to and did choose an assignee of the estate of said debtor Lewis Fox.

That the assignee thus chosen by the greater part in value and in number of the creditors of said Lewis Fox, who had proved their debts, was Alfred W. Bates.

That the said assignee so chosen, within five days, to wit, on said day, expressed in writing his acceptance of the said trust; whereupon the election and choice aforesaid was duly approved by the judge of the said district court.

That thereupon and on the fourth day of December, in the year of our Lord one thousand eight hundred and seventy-four, the said Edgar Ketchum, register, by an instrument under his hand, assigned and conveyed to the said Alfred W. Bates, as assignee, all the estate, real and
18 personal, of the said Lewis Fox, bankrupt, with all his deeds,

books, and papers relating thereto, which instrument and assignment was in form and words as follows:

19, 20 *Assignment of bankrupt's effects. Form No.* 18.

In the district court of the United States for the southern district of New York.

In the matter of Lewis Fox, bankrupt. No. 4982. In bankruptcy.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Know all men by these presents that Alfred W. Bates, of the city of New York, in the county of New York and State of New York, in said district, ha been duly appointed assignee in said matter. Now, therefore, I, Edgar Ketchum, register in bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Alfred W. Bates, the assignee as aforesaid, all the estate, real and personal, of the said Lewis Fox, the bankrupt aforesaid, including all the property, of whatever kind, of which he was possessed, or in which he was interested, or which he was entitled to have, on the tenth day of November, A. D. 1875, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act.

To have and to hold all the foregoing premises to the said Alfred W. Bates and his heirs forever, in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof, I, the said register, have hereunto set my hand and caused the seal of said court to be affixed this fourth day of December, A. D. 1875.

[L. S.] EDGAR KETCHUM,
Register in Bankruptcy.

21 That the said Alfred W. Bates is still and since has been the assignee of said estate thereunder, and said bankruptcy matter and proceedings is still pending; and the said jurors, on their oaths as aforesaid, do further present that the said Lewis Fox, in the district and circuit aforesaid, and within the jurisdiction of this court, after the commencement of bankruptcy proceedings aforesaid, on the tenth day of November, 1874, and ever since, parted with and concealed, and caused to be concealed, and still conceals, a book, to wit, a ledger, belonging to his estate and relating thereto, and has refused to deliver the same to the assignee aforesaid, although the same has been demanded, and refuses to tell where the same then was or now is, against the peace of the United States, and contrary to the form of the statute in such case made and provided.

22 SECOND COUNT.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said Lewis Fox, in the district and circuit aforesaid, and within the jurisdiction of this court, at the city of New York, in the county and State of New York, after the commencement of the bankruptcy proceedings aforesaid against him, and on the fourth day of De-

cember, in the year of our Lord one thousand eight hundred and seventy-four, and ever since, with intent to defraud, wilfully and fraudulently concealed, and still conceals, from Alfred W. Bates, his assignee aforesaid, large sums of money belonging to his estate, and required by title LXI of the Revised Statutes, and by the act of 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, and the various acts amendatory thereof and supplementary thereto, to be described in his inventory, to wit, the sum of over six thousand dollars in cash drawn out by the said Lewis Fox from the National Citizens' Bank, and received from the firm of R. Gruhn & Bro., in the month of September and October, eighteen hundred and seventy-four, and which moneys aforesaid were in the possession of said bankrupt and belonged to him, and was under his control at the time of the *time of the* commencement of the proceedings in bankruptcy aforesaid, and at the time of the appointment of the assignee aforesaid, demand for moneys have been made by and on behalf of said assignee of the said Lewis Fox and payment refused, against the peace of the United States, and against the form of the statute in such case made and provided.

23 THIRD COUNT.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said Lewis Fox, in the district and circuit aforesaid, and within the jurisdiction of this court, at the city of New York, in the county and State of New York, after the commencement of proceedings in bankruptcy as aforesaid, on the tenth day of November, in the year of our Lord one thousand eight hundred and seventy-four, did, with intent to defraud, willfully and fraudulently omit from his inventory the following-described property required by title LXI of the Revised Statutes of the United States, and by the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," and the several acts amendatory of and supplementary thereto, to be described therein, to wit, the sum of over six thousand dollars in cash, which money belonged to him and was in his possession and control at the time of the commencement of said proceedings in bankruptcy, and was a part of his estate in said bankruptcy, against the peace of the United States, and against the form of the statute in such case made and provided.

24 FOURTH COUNT.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said Lewis Fox, in the district and court aforesaid, and within the jurisdiction of this court, at the city of New York, in the county and State of New York, being the person respecting whom proceedings in bankruptcy were commenced upon his own petition as aforesaid, did, within three months next before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from the persons hereinafter mentioned, goods and chattels, with intent to defraud the persons from whom they were thus obtained. In

25 that the said Lewis Fox pretending and representing that he was a manufacturer of clothing in the city of New York, and representing that he was perfectly solvent and worth from twenty to thirty thousand dollars over and above all his debts and liabilities, and able to pay for all the goods that he would and did purchase; and further

representing and holding himself out that the goods thus purchased on credit were to be used in his business of manufacturer of clothing and in the said manufacturing, and for no other purpose, he did purchase goods, wares, and merchandize on credit of from thirty days to four months, as follows:

From the firm of Van Vorst, Bills & Co., of No. two hundred and seventy-one Canal street, in the city of New York, on the third day of September, 1874, cloths of the value and price of three hundred nineteen dollars and sixty-nine cents on a credit of four months; on the second day of October, eighteen hundred and seventy-four, cloths, on
26 a credit of four months, at the price of three hundred eighteen dollars and twenty-two cents; on the twenty-third day of October, eighteen hundred and seventy-four, cloths, on a credit of thirty days, of the price of two hundred and four dollars and sixty-two cents.

Of the firm of Rhind, Grierson and Emslie, of number one hundred and twenty-eight Church street, in the city of New York, on the fifth of October, eighteen hundred and seventy-four, cloths, on a credit of four months, of the value of one hundred and five dollars and forty-two cents, and on the nineteenth of October, eighteen hundred and seventy-four, on a credit of four months, cloths of the value of one hundred twenty-three $\frac{69}{100}$ dollars.

Of the firm of Root and Childs, of Hartford, Connecticut, goods consisting of cloths, on the nineteenth of October, 1874, on a credit
27 of thirty days, of the value of two hundred fifty-five dollars and ninety-nine cents; and on the twentieth of October, cloths, on a credit of thirty days, of the value of two hundred and forty dollars and ninety cents.

Of the firm of F. Mayer & Co., number thirty and thirty-two White street, in the city of New York, on the first day of September, eighteen hundred and seventy-four, on a credit of four months, ten pieces of cassimere worth two hundred and ninety-nine dollars and three cents; and on the twenty-third day of September, eighteen hundred and seventy-four, three pieces of cassimere, worth one hundred dollars and sixty-five cents, on like credit.

Of Andrew Lester, of number three hundred seventy-one Broadway, in the city of New York, on the twenty-first day of October, eighteen hundred and seventy-four, cloths, on a credit of thirty days, worth
28 two hundred twenty-one dollars and sixty-five cents.

Of Meyer & Schwab, of the corner of Church and Walker streets, New York City, cloths, on a credit of thirty days, as follows: October first, 1874, of the value of one hundred forty-eight dollars and twenty-five cents; October seventh, 1874, cloths of the value of twenty-three dollars and twenty-five cents; October 16th, 1874, cloths of the value of eighteen dollars.

Of Adolph Bernheimer, of number one hundred and five Franklyn street, in the city of New York, on October 21st, 1874, on a credit of thirty days, cloths of the agreed price and value of three hundred sixty-seven dollars and fifty-five cents.

Of Joseph Rosenthal, of number forty-four Lispenard street, in the city of New York, on the fifteenth day of September, eighteen hundred and seventy-four, cloths of the value of six hundred dollars.

Of Moritz Leipziger, of number two hundred and sixteen Church
29 street, on a credit of four months, Italian cloths, on the 2nd day of September, eighteen hundred and seventy-four, of the value of one hundred and seventeen dollars and fifty-seven cents; on the tenth day of September, eighteen hundred and seventy-four, on like credit,

Italian cloths of the value of one hundred and twenty-six dollars and fifty cents; on the twenty-fifth day of September, eighteen hundred and seventy-four, on like credit, cloths of the value of one hundred twenty-seven dollars and twenty-five cents; and on the seventh day of October, 1874, on like credit, clothes of the value of twenty-eight dollars and eighty cents.

Of the firm of Kutner and Fibel, of number seventy-four Chamber' street, in the city of New York, on the sixteenth of September, eighteen hundred and seventy-four, on a credit of thirty days, cloths of
30 the value of one hundred twenty-one dollars and ninety cents; and on the ninth day of October, eighteen hundred seventy-four, on a credit of thirty days, cloths of the value of one hundred nineteen dollars and thirty cents.

Of Henry Hewman, of number three hundred ninety-one Broadway, in the city of New York, on a credit of four months, cloths on the following days: On the twenty-ninth of September, eighteen hundred and seventy-four, of the value of sixty-six dollars and ninety-six cents; on the fourteenth of October, eighteen hundred and seventy-four, of the value of one hundred seventy-seven dollars and fifteen cents; and on the twenty-second day of October, eighteen hundred and seventy-four, of the value of one hundred thirty dollars and forty-nine cents.

Of the firm of M. Henlein & Company, of number one hundred
31 eighty-nine Church street, in the city of New York, on the twenty-fifth of September, 1874, cloths and merchandize, on a credit of thirty days, of the value of seventy-two dollars; and on the nineteenth of October, eighteen hundred and seventy-four, like goods, on a credit of thirty days, of the value of two hundred forty-three dollars and thirteen cents.

Of the firm of Stern & Company, of number forty Walker street, in the city of New York, on a credit of four months, cloths on the terms hereinafter mentioned, to wit, September third, 1874, of the value of eighteen dollars; September eighteenth, 1874, of the value of fifteen dollars; September twenty-ninth, 1874, of the value of three hundred and eleven dollars; on the second day of October, 1874, of the value of thirty-seven dollars and fifty cents; on the twelfth of October,
32 1874, of the value of one hundred fifty-six dollars and seventy-five cents; on the sixteenth of October, 1874, of the value of twenty-one dollars; and on the twenty-fourth day of October, of the value of twenty dollars.

Of the firm of Upham, Tucker & Company, of number seventy-four Thomas street, in the city of New York, on the twenty-first day of October, 1874, cloths, on a credit of thirty days, and on the twenty-sixth of October, 1874, cloths, on a credit of thirty days, of the value of two hundred eighty-five dollars and fourteen cents.

Of the firm of Anspach and Louis, of number seventy-nine Lispenard street, of the city of New York, on the first day of September, eighteen hundred and seventy-four, on a credit of four months, cloths of the value of one hundred eighty-one dollars and ninety-three cents; and on
33 October first, eighteen hundred and seventy-four, cloths, on a credit of four months, of the value of one hundred eighty-three dollars and fifty-seven cents.

Of the firm of Rothschild and Hayman, of number three hundred twenty-five Broadway, cloths, on a credit of thirty days, on the first day of September, eighteen hundred and seventy-four, of the value of one hundred forty-nine dollars and eighteen cents; and on the twenty-eighth of September, eighteen hundred and seventy-four, on a credit of

thirty days, cloths of the value of two hundred eighty-nine dollars and fifty-four cents.

Of the firm of Schloss Brothers, of number three hundred thirty-six Broadway, on the twenty-first of October, eighteen hundred and
34 seventy-four, on a credit of thirty days, cloths of the value of one hundred thirty-one dollars and fifteen cents.

Of the firm of William Turnbull & Company, of number fifty-three and fifty-five North street, in the city of New York, on the ninth day of October, eighteen hundred and seventy-four, on a credit of thirty days, cloths of the value of two hundred thirty-seven dollars and ten cents.

Of the firm of Phillip Beck and Brother, of corner of Walker and Elm streets, in the city of New York, on the twenty-fourth of September, in the year eighteen hundred and seventy-four, cloths, on a credit of four months, of the value of one hundred thirty-seven dollars and twenty-five cents; and on the second day of October, eighteen hundred and seventy-four, cloths of the value of one hundred twenty-six dollars.

35 And the jurors on their oaths aforesaid do further present that none of the aforesaid goods have been paid for and no part thereof has been paid, and all of said purchases were made by said Lewis Fox under the false color and pretence aforesaid, whereas in truth and in fact he purchased the said goods of the parties aforesaid with knowledge that he was insolvent, with the preconceived intent not to pay for them, and knowing that the representations made by him were false and untrue, and knowing at the time that he was about to fail and to go into bankruptcy, and that the said goods would never be paid for; and with the further false pretence that instead of manufacturing said goods into clothing, he, in fact, intended to and did sell them by the piece in
36 *in* good faith in the ordinary way of his trade, his goods and chattels, which have been obtained on credit and remain unpaid for, in that in the month of October and November, in the year eighteen hundred and seventy-four, he, the said Lewis Fox, being then a manufacturer of clothing, and the ordinary way of his trade being to buy cloths, cassimeres, and woolen goods, to manufacture the said goods into clothing, and then to sell them to retail dealers in clothing, and not otherwise, purchased of the creditors before mentioned large quantities of cloths and cassimeres, upon the dates and times described in the fourth count, on credit; and instead of manufacturing the said goods into clothing, he, the said Lewis Fox, in the said months of October and November, eighteen hundred and seventy-four, did sell and dis-
37 pose of the aforesaid goods, thus obtained on credit and remaining unpaid for, by the piece and by cases, to R. Gruhn and Brother, and K. Kleinert, of the city of New York, and to David Noritzky, of Birmingham, Connecticut, and S. Noritzky, of Stamford, Connecticut, for cash, and kept and converted the said cash so received to his own use; and that the said Lewis Fox sold the said goods in said manner and to said parties so that he might convert the same into cash and keep the proceeds thereof from his creditors, which he did, and the sales thus made were made at the time when he knew that he was insolvent and was going into bankruptcy, and were made in contemplation thereof; and the said Lewis Fox made such sales secretly and without the knowledge of his
38 creditors, and did not pay large quantities to the firm of R. Gruhn & Brother, and to one K. Kleinert several thousand dollars in value of the said goods for cash, in the months of October and November, in the year eighteen hundred and seventy-four; and was also selling goods at auction below cost, through the firm of H. Newhall

& Co., of San Francisco, California; all of which was contrary to his business of manufacturer of clothing, as he well knew, and which was all done against the peace of the United States, and contrary to the form of the statute in such case made and provided.

39 FIFTH COUNT.

And the jurors aforesaid, under their oaths aforesaid, *to* further present that the said Lewis Fox, within three months next before the commencement of proceedings in bankruptcy aforesaid, with intent to defraud his creditors, to wit, the various creditors mentioned and described in the fourth count, as follows:

Van Vorst, Bills & Co.; Rhind, Grierson and Emslie; Root and Childs; Whitman and Phelps; F. Mayer & Co.; Andrew Lester; Meyer & Schwab; Adolp Bernheimer; Joseph Rosenthal; Herman Bernheimer, Son & Co.; Wolf & Levy; Moritz Leipzeiger; Kutner & Fibel; Henry Newman; M. Henlein & Co.; Stein & Co.; Upham, Tucker & Co.; Anspach & Louis; Rothschild & Heyman; Leland, Allen & Bates; Schloss Brothers; William Turnbull; Philip Bick & Brother, and all his other creditors, did dispose of otherwise than
40 by transactions made any of his creditors with the monies thus received, or account for or pay over the same to his assignee in bankruptcy; and the said sales aforesaid were not made in good faith in the ordinary way of his trade, but were disposed of outside of the ordinary way of his trade *but were disposed of outside of the ordinary way of his trade*, as he well knew at the time of such disposal; and your jurors aforesaid are unable to give a more particular description of the goods thus fraudulently disposed of because of the secrecy with which the said Lewis Fox conducted the said transactions. All of which was done and performed by the said Lewis Fox against the peace of the United States, and against the form of the statute in such cases made and provided.

41 SIXTH COUNT.

And the jurors aforesaid, on their oaths aforesaid, did further present that the said Lewis Fox, within the district and circuit aforesaid, and within the jurisdiction of this court, on the 16th of October, in the year one thousand eight hundred and seventy-four, at the city of New York, and within three months next before the commencement of proceedings in bankruptcy as aforesaid, under the false color and pretense of carrying on business and dealing in the ordinary course of trade of him the said Lewis Fox as a manufacturer of clothing, and on the pretence that he was perfectly solvent and that he had property in Birmingham, Connecticut, to wit, real estate encumbered by no more
42 than five thousand dollars, and that he was able to and would pay for all the goods he was then purchasing, as well as all he owed, he, the said Lewis Fox, did purchase and obtain on credit from the firm of C. & S. Werner, of the city of New York,
43 cloths and cassimeres of the value of two hundred and two dollars and seventy-nine cents on a credit of thirty days, which goods were obtained from the said C. & S. Werner by the said Lewis Fox with intent to defraud said C. & S. Werner, solely and only upon the representations made as aforesaid, and the color held out by him that he, the said Lewis Fox, was carrying on business as a manufacturer of clothing and not otherwise; that in truth and in fact, however, said Lewis Fox was not carrying on business in the ordinary

course of trade as a manufacturer of clothing, but was selling goods by the piece, for cash, to R. Gruhn and Brother, K. Kleinert, and at auction, through the firm of H. Newhall & Co., below cost, to other parties, to the jurors unknown, in a secret manner; and he was insolvent and not able to pay one-half of his creditors what he owed them, nor for the goods he was then purchasing and did purchase of said C. & S. Werner, nor did he intend to pay for them; and his property in Birmingham was encumbered by more than five thousand dollars, but by eight thousand dollars; and the said Lewis Fox knew that his repre-
44 sentations aforesaid were false and untrue when he made them, and made them with intent to defraud C. & S. Werner aforesaid, and did thereby defraud them out of the goods aforesaid; and the said Lewis Fox was at said time contemplating bankruptcy, and made the purchase aforesaid with the additional intent of not paying for said goods, against the peace of the United States, and contrary to the form of the statute in such case made and provided.

SEVENTH COUNT.

And the jurors aforesaid, on their oaths, do further present that the said Lewis Fox, in the city of New York, in the district and circuit aforesaid, and within the jurisdiction of this court, on the twenty-third day of October, in the year one thousand eight hundred and seventy-four, and within three months before the commencement of proceedings in bankruptcy aforesaid, and with intent to defraud, did obtain on a credit of thirty days from the firm of Leland, Allen & Bates, of
45 the city of New York, goods and chattels, consisting of cloths and cassimeres, of the value of two hundred and ninety-three dollars and ninety cents, under the false color and pretence of him, the said Lewis Fox, of carrying on business and dealing in the ordinary course of trade by him, the said Lewis Fox, that he was a manufacturer of clothing, and carrying on his business as such, and that he was solvent and would pay for said goods when the payment became due; whereas in truth and in fact said Lewis Fox was then insolvent, and knew then that he was insolvent, and further knew that he never would pay for said goods, and in fact did not intend even to pay for them, and knew that then and there, within the thirty days and before said time of credit would expire, he would become a bankrupt, and that the goods aforesaid, instead of being manufactured into clothing and sold in the regular course of business a' such manufactured, they would go to his assignee in bankruptcy; and the said Lewis Fox made all of said representations and obtained said goods on credit aforesaid with intent
46 to defraud said Leland, Allen & Bates, against the peace of the United States, and contrary to the form of the statute in such case made and provided.

EIGHTH COUNT.

And the jurors aforesaid, upon their oaths, do further present that the said Lewis Fox, at the city of New York, and in the circuit and district aforesaid, on the ninth day of October, in the year one thousand eight hundred and seventy-four, within three months before the commencement of proceedings in bankruptcy aforesaid, did, with intent to defraud, and under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtain, on a credit of thirty days, from Alfred Woodbridge and William Trumbull, composing the

firm of William Trumbull and Company, of the city of New York, goods consisting of cheviots of the value of two hundred thirty-seven dollars and ten cents, which said goods Lewis Fox obtained from said firm on the representation and pretence made by the said Lewis Fox that
47 he was dealing in the ordinary course of trade as a manufacturer of clothing, and that the said goods thus purchased would be used for the manufacture of clothing, *and that the said goods thus purchased would be used for the manufacture of clothing*, by said Lewis Fox, and that he was *in*solvent and able and would pay for said goods when the term of credit would expire; whereas in truth and in fact said Lewis Fox was not carrying on his business in the ordinary course of trade as a manufacturer of clothing, but was selling piece-goods, consisting of cloths and cassimeres, secretely in large quantities for cash to R. Gruhn & Brother, K. Kleinert, and at auction, through the firm of H. Newhall & Co., below cost, and other parties to the jurors unknown, and he was insolvent, and knew when he purchased said goods that he was insolvent, and that the said goods would never be paid for; and he further knew then and there that about the expiration of said term of credit he would be a bankrupt; and he, the said Lewis Fox, obtained said
48 goods on credit and made the representations aforesaid, all with the intent to defraud said firm of William Trumbull & Co., and for no other purpose, against the peace of the United States, and contrary to the form of the statute in such cases made and provided.

NINTH COUNT.

And the jurors aforesaid, on their oaths, do further present that the said Lewis Fox, at the city of New York, in the district and circuit aforesaid, and within the jurisdiction of this court, on the sixth day of October, in the year one thousand eight hundred and seventy-four, and within three months before the commencement of proceedings in bankruptcy, and under the false color and pretence of carrying on business and dealing in the ordinary course of trade of him, the said Lewis Fox, as a manufacturer of clothing, and that he was perfectly solvent and able to pay for all that he would buy, and that he would pay his bills when they became due, he did obtain on credit
49 from Morris Leipziger, of the city of New York, a brown piece of cloth, of the value of twenty-eight dollars and eighty cents, on a credit of thirty days, with intent to defraud said Morris Leipziger. That he, said Lewis Fox, was not carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing, but was secretely selling his goods for cash to R. Gruhn and Brother, K. Kleinert, and at auction, through the firm of H. Newhall & Co., below cost to other parties to the jurors unknown, and converting the money thus received to his own use; and he was insolvent and not able to pay for all that he would buy, and that he would not pay his bills when they became due, and, in fact, never intended to pay them, and did not intend to pay for the goods purchased as aforesaid; all of which he knew at the time he made the purchase as aforesaid of said Morris Leipziger; and he further knew at said time that he was about becoming bankrupt, and he made all of the representations aforesaid
50 knowing them to be false, and with intent to defraud, against the peace of the United States, and contrary to the form of the statute in such case made and provided.

TENTH COUNT.

And the jurors aforesaid, on their oaths, do further present that at the city of New York, within the circuit and district aforesaid, and within the jurisdiction of this court, the said Lewis Fox, being a person respecting whom proceedings in bankruptcy are commenced upon his own petition, did, on the tenth day of November, in the year one thousand eight hundred and seventy-four, and even thereafter, secrete and conceal property belonging to his estate and still does secrete and conceal the same, to wit, that is to say, merchandize to the amount of over thirty thousand dollars, or the proceeds thereof, which merchandize was purchased between August first, eighteen hundred and seventy-four, and the first
51 day of November, eighteen hundred and seventy-four, from the parties hereinafter set out, and no part has been paid for or accounted for in any manner; and which goods he, the said Lewis Fox, duly received and in some manner unknown to said jurors has concealed and secreted, or, if disposed of, he has concealed and secreted the proceeds thereof.

The following are the parties from whom the goods were received, and the amounts thereof:

H. Brach & Co., nine hundred and two dollars and ninety-four cents; C. & S. Werner & Co., fifteen hundred twenty-two dollars and ninety-one cents; Sweet, Orr & Co., four hundred twenty-nine dollars and forty-five cents; Henry Newman, eight hundred twenty-five dollars and sixty cents; Meyer & Schwab, eight hundred and ninety-eight dollars and eight cents; Stern and Company, nine hundred and fifty-five dollars and seventy-five cents; Church & Brother, one hundred fifteen dollars and ninety-six cents; L. Haas, nine hundred forty-two dollars and ninety-nine cents; Kup, Kupper and Silverman, sixteen hundred
52 sixty dollars and ninety-six cents; A. S. Herman, two hundred ninety-eight dollars; William Turnbull and Company, fourteen hundred and fifteen dollars and forty-two cents; Moritz Leipziger, ten hundred and fifty dollars and thirty-one cents; H. B. Claflin & Co., seventy-one hundred ninety-six dollars; Charles Lewis and Brothers, six hundred ninety-eight dollars and twenty-one cents; Rothschild & Heyman, four hundred thirty-nine dollars and thirty-two cents; K. Kleinert, three hundred and fifty-one dollars; Weil Brothers and Dreyfuss, five hundred seventy-eight dollars and seventeen cents; Herman Bernheimer, Son & Co., eight hundred thirty-nine dollars and fifty-seven cents; Isedor Rosenthal, eleven hundred and seventy-nine dollars and seventy cents; Anspach & Louis, eight hundred sixty-eight dollars and seventy cents; Whitman & Phelps, eight hundred and sixty-seven dollars and ninety-four cents; Julius Salmson, three hundred eighty dollars and forty-six cents; Andrew Lester, two hundred twenty-one dollars and sixty five cents; Adolph Bernheimer, three hundred
53 sixty-seven dollars and fifty-five cents; Gardner Hall, j'r, & Co., two hundred twenty-five dollars and seventy-five cents; Isaac Feig, three hundred twenty-seven dollars and twenty-five cents; Root & Childs, four hundred ninety-six dollars and eighty-nine cents; Beck and Brother, four hundred sixty-three dollars and eight cents; Leland, Allen & Bates, twenty-five hundred and eighteen dollars and eight cents; F. Meyer & Co., twelve hundred and twenty-seven dollars and fifty-eight cents; Wolf & Company, five hundred sixty-five dollars eleven cents; Kutner & Fibel, three hundred thirty-two dollars *dollars* and ninety-five cents; Rhind, Grierson & Emslie, five hundred ninety-two dollars; Hymes Brothers, five hundred sixteen dollars and twenty-

seven cents; Nicholas Van Vorst & Company, eight hundred forty-two dollars and fifty-one cents; M. Henlein & Co., three hundred and fifteen dollars and thirteen cents; Wolf & Levy, four hundred ninety-seven dollars and seventy-nine cents; C. Rouse, ninety-six dollars and nineteen cents; Seth B. Hunt and Company, two hundred and three
54 dollars and thirty-four cents; Upham, Tucker and Company, five hundred and one dollars and ninety-seven cents.

That said Lewis Fox possessed and owned said merchandize, or the proceeds thereof, at the time of the filing of said petition in bankruptcy by him, and has secreted and concealed the same in some manner unknown to said jurors, against the peace of the United States, and contrary to the form of the statute in such case made and provided.

GEO. BLISS,
U. S. Attorney.

55 At a circuit court of the United States for the second circuit and southern district of New York, begun on the day of in the year one thousand eight hundred and seventy- , and continued by adjournment, to and including the day of in the year one thousand eight hundred and seventy- , and on the day last aforesaid, at the city of New York, in the district and circuit aforesaid.

Present, the Hon. Charles L. Benedict, judge.

THE UNITED STATES
against

A bill of indictment having been presented against the said defendant by the grand jurors of the said district, in manner and form hereinbefore set forth, and the said cause having been duly tried by a jury at a circuit court of the United States for the district and circuit aforesaid, begun on the day of in the year one thousand eight hundred and seventy- ; and the jury aforesaid having found therein a verdict of "guilty," and the defendant having been heretofore remanded to await the sentence of the court: Now, on motion of George Bliss, esq., United States attorney for the southern district of New York, the defendant being here present in court, it is ordered that the said defendant be imprisoned in for the term of , and that he pay a fine of dollars. And it is further ordered that the fine aforesaid be forthwith docketed as a judgment of this court.

(Indorsed:) U. S. circuit court. The United States of America vs. Lewis Fox. Indictment. Fraudulent bankruptcy. U. S. Rev. St., § 5132. George Bliss, U. S. district attorney. A true bill. Nathan C. Ely, foreman. Filed M'ch 7, 1876.

March 13, 1877, the defendant arra'*nge*d and indict. read. Def't plead guilty.

18 , the defendant called on . Recognizance and appearing same .

May 24, 1877, the defendant tried. Verdict, guilty, 4, 6, 7, 8 & 9th counts.

May 22, '77. As to 1st, 2 & 10th counts, nolle prosequi entered.

56 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second cir-

cuit, held at the United States court-rooms in the city of New York, on Monday, the 13th day of March, in the year of our Lord one thousand eight hundred and seventy-six.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES *vs.* LEWIS FOX. } Fraudulent bankruptcy.

On motion of the United States district attorney, ordered arraignment. The defendant, on being arraigned, pleads not guilty.

57 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Thursday, the 17 day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES *vs.* LEWIS FOX.

On motion of the United States district attorney, ordered trial.

Jurors sworn.—Herman C. Von Post, Henry A. Buckhart, James English, John F. Purdy, Joseph Arnold, John W. Graydon, Isaac B. Newcomb, James M. Denel, Charles G. Waterbury, James Ballard, Francis B. Arnold, Robert T. Andrews.

Alexander Blumenstiel, esq., opens the cause on part of prosecution.

Evidence for prosecution.

58 Bankruptcy proceedings in the U. S. district court in the matter of Lewis Fox ..... Read.

Alfred W. Bates	Sworn.	
Day book	Exhibit	A.
Express receipt book	"	B.
" " "	"	C.
" " "	"	D.
" " "	"	E.
" " "	"	C 1, 2 & 3.
" " "	"	F.
" " "	"	G.
" " "	"	H.
" " "	"	I.
Eleven checks marked	"	J 1 to 11.
Alvin Hall	Sworn.	
Aaron Harris	"	
Charles Werner	"	

Court adjourned to 18th inst., at 11 a. m.

59 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York,

on Friday, the 18 day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

This cause being still on trial, the jurors are called, and severally answer to their names.

Evidence for prosecution.

Charles Werner	Resumed.
6 checks	Def't's ex't.
Two statements	Exhibits K¹ & K².
Abraham K. Leon	Sworn.
Alfred Woodbridge	"
Abraham Levi	"
Julius Solmson	"
James F. Bells	"
Isidor Rosenthal	"
Alfred Woodbridge	Recalled

Court adjourned to 21st inst. at 11 a. m.

60 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 21st day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

This cause being still on trial, the jurors are called, and severally answer to their names.

Evidence for prosecution.

Julius R. Meyer	Sworn.
Moritz Leipziger	"
Solomon A. Herman	"
Philip Bick	"
Charles Werner	Recalled.
Solomon Wolf	Sworn.
Moses Wild	"
Frederick Ward	"
Thomas D. Adams	"
Paper	Def't's Ex. 2.

Court adjourned to 22d inst. at 11 a. m.

61 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York,

on Tuesday, the 22d day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

This cause being still on trial, the jurors are called, and severally answer to their names.

On motion of the United States district attorney, ordered, that a nolle prosequi be entered to the 1st, 2d, and 10th counts of the indictment.

James M. Smith, esq., moves to direct a verdict of acquittal.

Benj. B. Foster, esq., is heard in opposition to same.

Motion denied.

Evidence for prosecution.

Aaron Brumer ..... Sworn.
62 Philip Bick ..... Recalled.
Solomon Wolff ..... "
Horace Gilpin ..... Sworn.
Levi Morris ..... "
Alfred W. Bates ..... Recalled.
Abraham Levi ..... "

Evidence for defense.

Almi J. Hall ..... Recalled.
Francis B. Chedsey ..... Sworn.
Isaac B. Kleinert ..... "

Court adjourned to 23d inst. at 11 a. m.

63 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the 23d day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

This cause being still on trial, the jurors are called and severally answe to their names.

Evidence for defence.

Extract from the books of H. B. Claflin & Co ..... Def't's Ex. 3.
Isaac B. Kleinert ..... Resumed.
Charles Werner ..... Recalled.
Rudolph Gruhn ..... Sworn.
Isaac Cohen ..... "
Henry Chuck ..... "

James M. Smith, esq., sums up on part of defence.

Court adjourned to 24th inst. at 11 a. m.

64 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second

circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 24th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Judge Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

This cause being still on trial, the jurors are called and severally answer to their names.

James M. Smith, esq., concludes his summing up on part of the defence.

Benj. B. Foster, esq., sums up on part of prosecution.

Charge is thereupon given by the court to the jury, who retire under charge of an officer duly qualified to attend them, and on their return say that they find the prisoner guilty of the charges contained in the indictment, and so they say all.

65 Ordered, That the prisoner be remanded to the custody of the U. S. marshal.

On motion of J. M. Smith, esq., dist. attorney consenting thereto, ordered, that Lewis Fox enter into sufficient bail before a commissioner of this court in the sum of five thousand , conditioned for his appearance before this court on the 11th day of June, 1877, to do and receive what shall then and there be determined concerning him, meantime to stand committed.

66 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Thursday, the 14th day of June, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Charles L. Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

The motion in arrest of judgment in the above-entitled cause coming on to be heard,

Benj. F. Tracey, esq., is heard in favor of motion.

Benj. B. Foster, esq., is heard in opposition to same.

Benj. F. Tracey is heard in reply.

Curia advisari vult.

67 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on the 17 day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Charles L. Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

The motion to set aside and vacate the order entered in the above-entitled action on the 24th day of May, 1877, coming on, and after hear-

ing Benj. B. Foster, esq., assistant United States district attorney, no one appearing to oppose said motion,

Ordered, that the same be granted.

68 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Wednesday, the 10th day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

Present, the honorable Charles L. Benedict, circuit judge.

THE UNITED STATES
vs.
LEWIS FOX.

Ordered, that the motion in arrest of judgment in the above-entitled cause be reargued at the term of the circuit court commencing the third Monday of October, 1877.

69 At a term of the circuit court of the United States for the southern district of New York, held on the 3d Monday of October, A. D. 1877.

Present, Hon. Alexander S. Johnson, circuit judge; Hon. Charles L. Benedict, district judge.

THE UNITED STATES
vs.
LEWIS FOX. } Indictment.

Whereas a question has occurred in the above-entitled case before the circuit court aforesaid upon which the opinions of the judges holding the same are opposed, and the United States attorney prosecuting in behalf of the United States, and Benjamin F. Tracy, esquire, of counsel for the defendant, have requested that the point upon which the disagree-

70 ment has happened shall be stated under the direction of the judges and certified under the seal of the court to the Supreme Court for final decision:

Now, therefore, it is hereby accordingly stated as follows:

On the 7th day of March, 187[illegible], an indictment was presented in the circuit court of this district, charging Lewis Fox with the offence described in the ninth subdivision of section 5132 Revised Statutes of 1874.

On the 17 May, 1877, the cause came on for trial before Hon. Charles L. Benedict and a jury, and on the 24th day of the same May a verdict of guilty was found.

Thereupon a motion in arrest of judgment was made and argued before Judge Benedict, who afterward ordered a reargument of the same at the term of the court to be held on the 3d Monday of October, 1877.

The question raised by the argument and upon which the disagreement occurs is this:

71 If a person shall engage in a transaction which at the time of its occurrence is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretences, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of Congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?

And this, with a copy of the indictment herein and an abstract of the record, the clerk of this court is directed to certify under seal of this court to the Supreme Court at its next session.

ALEXANDER S. JOHNSON.
CHARLES L. BENEDICT.

(Endorsed:) U. S. circuit court southern dist. of N. Y. The United States vs. Lewis Fox. Certificate of division. U. S. circuit court. Filed Oct. 31, 1877. John I. Davenport, clerk.

72 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to seventy-one inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of the United States of America against Lewis Fox as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 17th day of November, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the said United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT,
Clerk.

(Indorsement on cover:) No. 995. The United States, plaintiffs, vs. Lewis Fox. S. New York C. C. U. S. Certificate of division. Filed 19th November, 1877.

Supreme

In the Court of ~~Claims~~ the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
LEWIS FOX. } No. 995.

FROM CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK UPON DIVISION OF OPINION.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Indictment found in United States circuit court, sitting in New York City, March 7, 1876, against Lewis Fox, of that city, containing ten counts, the first, second, and tenth of which were *nol. prossed*, and the prisoner found guilty generally as to the residue. The offense set forth was, in substance, that on the 10th day of November, 1874, at New York, Fox, owing debts provable in bankruptcy of over $300, &c., then and there filed his voluntary petition in bankruptcy, &c., in due form, and was adjudicated a bankrupt. The customary proceedings are then detailed, whereby one Bates became assignee.

The third count alleges a fraudulent omission to inventory $6,000, drawn from the National Citizens' Bank

and received by the bankrupt from F. Gruhn & Bro., in September and October, 1874. (Record, 9.)

The remaining counts, in varying phraseology, set out the transaction upon which the legal question arose which divided the court. It was, substantially, that Fox, being the person respecting whom said proceedings in bankruptcy were had, "did, within three months next before the commencement of said proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from the persons hereinafter mentioned goods and chattels, with intent to defraud the persons from whom they were thus obtained, in that the said Fox, representing that he was a manufacturer of clothing in the city of New York," &c., reciting the false pretenses, their falsity, when (October, 1874), where, and upon whom they were practiced, the value of the goods thereby obtained, and that they never were paid for, concluding with an averment that Fox obtained all the goods under the false color and pretense aforesaid, sold them outside of the ordinary way of trade (by the piece, not made up, &c.), *and went into bankruptcy with the fraudulent design never to pay for them* (Record, pp. 14, 15, close of each count.)

After a verdict of guilty was rendered, a motion in arrest of judgment thereon was filed, upon which arose a division of opinion as to a question which is thus stated for the consideration of this court (Record, 22):

QUESTION STATED.

"Where a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods

upon credit by false pretenses, and if subsequently thereto proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of Congressional legislation to subject him to punishment for such transaction, considered in connection with the proceedings in bankruptcy? (Record, p. 22, bottom.)

STATUTE.

The statute upon which the indictment is founded relates to the penalties against a fraudulent bankrupt, the clause declaring the punishment of the offense with which Fox is charged being this: "Section 5132. Every person against whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor * * * Ninth. Who within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud * * * shall be punishable by imprisonment, with or without hard labor, for not more than three years." (Revised Statutes p. 997, § 5132.)

BRIEF.

To ascertain the meaning of any language used it often becomes necessary—much more frequently so than otherwise—to refer to the context, and to consider the subject matter with reference to which it is employed. So doing in this case, we find the question arising upon the motion to arrest the rendition of judgment upon the verdict is substantially that which would have been raised by a demurrer to the indictment, namely, whether or not

the acts which the prisoner is conclusively found to have done, *and with the intent alleged*, constitute any offense against Federal law; the doubt suggested being as to the competency of Congress to make an act a crime if the doer of it is petitioned in bankruptcy within three months of its commission, which otherwise does not become criminal under national law.

It may aid in reaching a correct result to divide the argument, and *first* to consider whether it is competent for *any* legislative body to make any legal proceedings similar to those in bankruptcy operate retroactively, so as to make that an offense which was not so when done; and, secondly, if there is nothing in the natural or constitutional limitations upon the power of State or foreign legislatures to prevent the passage by them of such enactments, is there any authority to adopt such legislation conferred upon Congress by the Federal Constitution?

I.

Is this legislation contrary to natural justice, or in excess of ordinary legislative powers?

That it is not, may be inferred from the many instances of it in England and in our several States, sanctioned by universal approval. It is very common for penal laws to declare that several successive events shall transpire to constitute a crime and incur its penalty, without the concurrence or combination of which no offense shall be deemed to exist, and no liability to punishment. For instance, a single act of sale or brokerage, &c., by an unlicensed person would not constitute an offense against the revenue laws; but the bare repetitions (after some interval of time, no matter what) of the act originally lawful would be an offense.

It will be a fair parallel if we take, by way of illustration, acts which are wrong in morals, but not punishable by law, as was Fox's conduct in obtaining goods by false pretenses.

Adultery and fornication are not crimes at common law, yet the open repetition of them is one; so are those acts which make one a barrator, common scold, &c.

Indeed, no difference is perceived in principle whether the act, the repetition of which constitutes an offense, be one that is itself punishable or not; for if it be so, and be punished, it then stands, so far as the law is concerned and considered as an element of another crime, upon the same footing as an innocent act. If an act innocent in itself cannot form one of combination of acts that constitute a crime, neither by parity of reasoning can one which has been already punished; for if so, a man would be twice punished for the same offense. But it has always been held that the innocent act, or the one which has received its punishment, is in law a very different thing from the offense of which it is one of the elements in combination. Thus, one who has been three times convicted of larceny may be sentenced as a common thief; or if found guilty of three illegal sales of liquor, as a common seller, &c.; or may be convicted upon proof of the same repeated acts, of the single offenses, and of such other crimes as their combination may amount to; *e. g.*, for keeping a drinking-house and tippling-shop, and for being a common seller. State *v.* Inness (53 Maine, 536, citing Hale's Pl. Cr., 241); 4 Bla. Com., 336; Com. *v.* Andrews (2 Mass., 409); Com. *v.* Roby (12 Pick., 496); State *v.* Sonnerkalb (2 Nott & McC., 280); State *v.* Taylor (2 Bailey, 49); Regina *v.* Brettel (1 C. & M., 609), and other authorities.

It can make no difference whether the combination which completes the crime is a repetition of the same acts or the doing, at a greater or less interval, of the several acts, all tending to accomplish the improper purpose and done with the unlawful intent which the law intends to prevent and punish. That fraudulent intent is distinctly alleged and proved in the present case.

In 1872 a license-law was passed in Connecticut, by the tenth section of which it was provided that "every person who shall keep a house, store, shop, saloon, or other place in which it is reputed that spirituous and intoxicating liquors, ale or lager beer, are kept for sale without having a license therefor," &c., shall be punished, &c. This statute did not purport to punish any single act, except that made up of things done, and a reputation thereby acquired, over a period of time. In State *v.* Morgan (40 Conn., 44, 46), the court of that State sustains this law, and indicates the acts which may give this criminal reputation. So of a house which by combined force of repeated acts becomes one of ill name and fame, &c.

This section (Revised Statutes, 5132, item ninth) was embodied in the original act of March 2, 1867, c. 176, § 44 (14 Stats., 539), and was borrowed, almost in its identical words, from the 12 and 13 Vict., c. 106, § 253, which follows but extends the 5 and 6 Vict., c. 122, § 35. In the case of Reg. *v.* Boyd (5 Cox Cr. L. Cases, 502, 504), the respondent was found guilty and sentenced under this section, before Alderson, B., and Wightman, J., the former giving to the jury the views of the court. It is a case on all-fours with the one at bar. There have been many convictions in England under this statute, which has been repeated, coupled with other strin-

gent provisions in the consolidated acts of 1869. Reg. *v.* Cherry (12 Cox Cr. L. Cases, 32, 36); Reg. *v.* Watkinson (*Id.*, 271–4); Reg. *v.* Raudnitz (4 F. and F., 171).

The above-mentioned case of Regina *v.* Boyd is cited by Miller, J., in his opinion in United States *v.* Prescott (2 Bissell, 327). In that volume is reported a case of conviction under this section, where the instruction to the jury was that, upon sufficient evidence, they might "infer an intent to defraud, reaching back to the time when the goods were obtained." United States *v.* Frank (*Id.*, 263, 266).

The obtaining of goods by such false pretenses could properly be made punishable under State laws if the offender never became a bankrupt. Com. *v.* Walker (108 Mass., 309, 312–314, and cases cited). The nature of the acts, then, is such as to make them properly cognizable by courts of criminal jurisdiction.

"In order to determine with certainty, irrespective of the general test above indicated [*i. e.*, the liability of the actor to punishment], the nature of a crime, we must search for the ingredients in it, and we shall find that a crime is constituted by *an overt act done with a guilty intent*, or includes a guilty mind, knowledge or possession, affecting or prejudicing the public." Broom's Philos. of Law (Am. ed.), 215, § 164; *Id.*, 31, § 17, and pp. 222–3, § 171.

II.

Conceding the false pretenses and fraudulent intent of Fox in obtaining these goods to be such as to justly render him amenable to the penal laws of New York, is it also proper and competent to hold him answerable therefor at the bar of a Federal court?

That he is punishable by State law is not, of itself, any conclusive argument against liability under a Congressional enactment. So held, in this and several State courts, as to offenses connected with the coinage and circulation of counterfeit money. Fox *v.* Ohio (5 Howard, 410), in which McLean, J., dissented upon the ground that the power to punish was exclusively in the General Government.

"Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. *The same act may be an offense or transgression of the laws of both.*" Moore *v.* Illinois (14 Howard, 13, 20, giving examples, per Grier, J., and citing 5 Howard, 410), and United States *v.* Marigold (9 Howard, 560). Harlan *v.* People (1 Doug., 207); Hendrick's case (5 Leigh., 707, 713); Jett *v.* Com. (18 Gratt., 933).

The Constitution gives the right to establish a uniform system of bankruptcy, or "uniform laws on the subject of bankruptcies." This necessarily includes the power to enforce obedience to these laws by penalties for their violation. A power to regulate commerce without the ability to compel compliance with these regulations would be an absurdity—mere *brutum fulmen.* Even within the limits of a State, which adopts whatever policy she chooses as to the sale of liquors by and between her own citizens, the Federal law can punish one who has sold liquor to an Indian; or who, having liquor in his possession outside of a reservation, is about to introduce it into the Indian country. United States *v.* 43 Galls. of Whisky, &c. (93 U. S., 188). The power to establish post-offices and post-roads justifies the denun-

ciation of punishment against those who obstruct the mail or commit depredations upon it, though done in a manner to make the party also amenable to State law. "The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power. It cannot be imputed to wise and practical statesmen, nor is it consistent with common sense, that they should have vested this high and exclusive authority, and with a view to objects partaking of the magnitude of the authority itself, only to be rendered vain and useless, as must have been the case had the government been left disabled and impotent as to the only means of securing the objects in contemplation." United States *v.* Marigold (9 Howard, 567); 2 Story on Const., § 1237.

The section under consideration is one "necessary and proper" to accomplish the purpose for which bankrupt laws are enacted; that is to say, it is so intended, and is well adapted to that end. United States *v.* Pusey (6 Bank. Reg., 284).

It is almost a conclusive argument in favor of the provision that it was adopted by Congress in good faith, as an exercise of its general constitutional authority over this subject.

That it is fairly deemed appropriate to carry out the bankrupt law is evident from its being included in the various laws passed in England upon this subject, instead of being found as part of the general criminal legislation; abundant provision being already made for the act of cheating by false pretenses by those not being put into bankruptcy within three months.

The purpose of the bankrupt act of 1867 was twofold;

(1st) to secure an equal distribution of a debtor's assets among his creditors; and (2nd) to relieve the man who had promptly, freely, and honestly turned over all his estate for this distribution from being further mortgaged as to his future efforts and earnings. In the accomplishment of these ends, the requirement of a payment of fifty per cent., the various clauses against preferences, &c., show the purpose to compel the filing of a petition immediately upon its becoming evident that a person could not provide for his debts as they matured, and that his trade or business must be broken up. It was not intended that, by continuing to obtain goods on credit or otherwise, a man who knew himself to be insolvent should transfer his debts from one set of creditors to another. He should, upon becoming insolvent, at once proceed to have his property distributed *pro rata* among those who are *then* his creditors.

A man finding himself insolvent is thereby notified that, if he obtain any more goods by such false pretenses as this section mentions, he will become punishable thereunder if petitioned into bankruptcy within three months. This fact of a petition is an additional element which plainly distinguishes the offense from that of cheating by false pretenses merely. Com. *v.* Walker (108 Mass., 314).

In the present indictment it is alleged that the prisoner's design in going into bankruptcy was the fraudulent intent not to pay for these goods. (Record, p. .)

The subsequent adjudication is taken as evidence of the intent to defraud (by means of the bankrupt act) existing at the time he obtained the goods. Cathcart *v.* Robinson, 5 Peters, 279.

That is to say, here it is averred and proved that the

constitutionally devised bankrupt system of Congress was perverted by Fox for the purpose of fraud and illegal gain; that the machinery of this law was but a part of his scheme for defrauding his creditors; that its use was the completion of the plan of which the false pretenses were the inauguration; and it was only by the benefit of the act that he hoped to enjoy his ill-gotten spoils undisturbed. Certainly Congress could legislate to punish any such attempt to pervert the beneficent purposes of the bankrupt act. "It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the Constitution gave no countenance." McCulloch *v.* Maryland (4 Wheaton, 402).

Upon a previous count in the indictment, Fox was convicted of fraudulently omitting from the inventory and concealing $6,000, the avails of this property thus fraudulently obtained and disposed of. (Record, p. 9, third count.)

EDWIN B. SMITH,
Assistant Attorney-General.

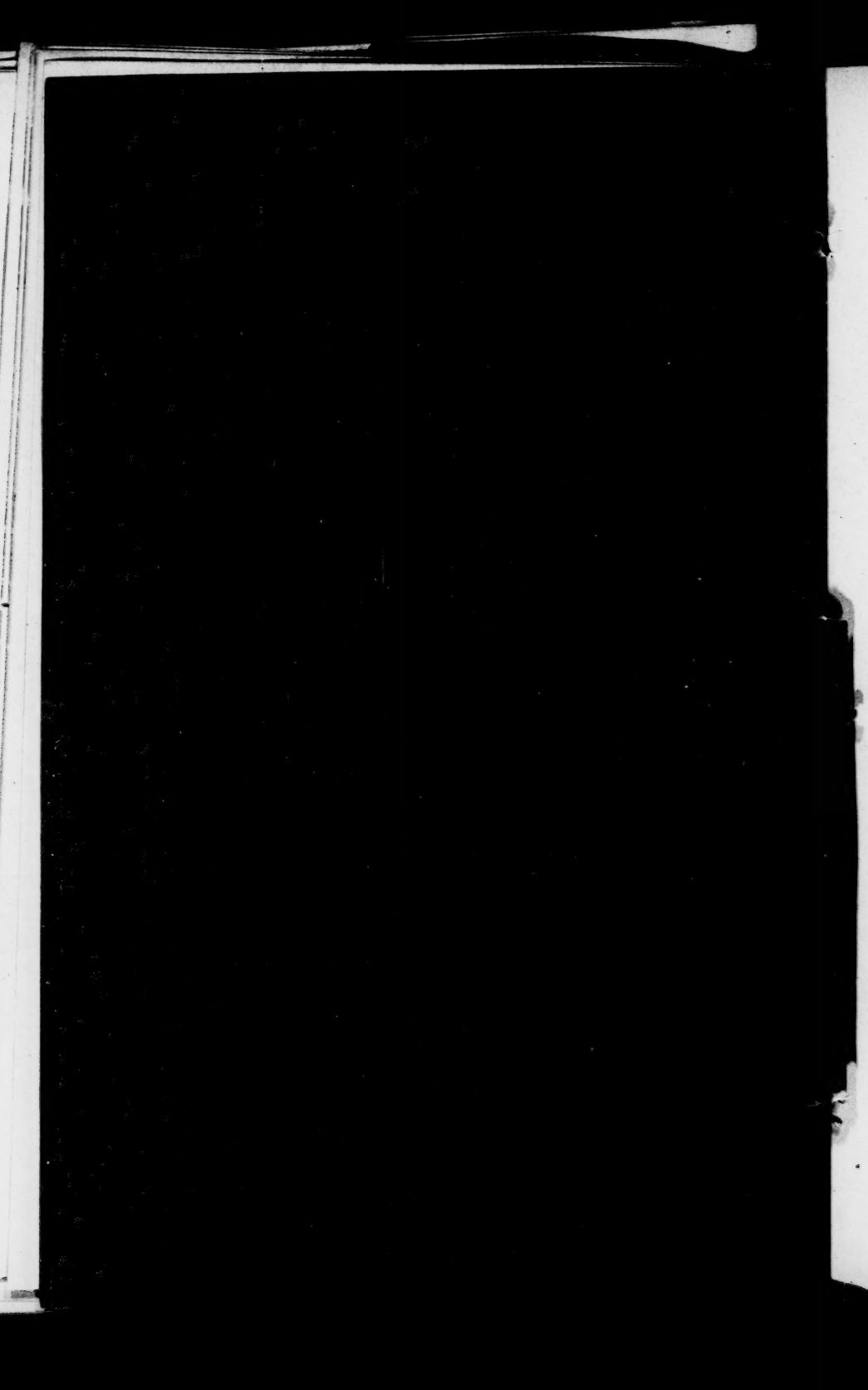
In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
LEWIS FOX. } No. 995.

FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the United States in Reply.



In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v.
LEWIS FOX. } No. 995.

FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES IN REPLY.

I.

The error of the respondent, as we conceive it to be, arises from a mistake as to the "transaction" which is subjected to punishment under Revised Statutes, sec. 5132, item ninth. It does not profess to punish the mere act of obtaining goods by false pretenses; but so obtaining them coupled with the additional ingredient of bankruptcy proceedings within three months.

We assent to the first sentence of the third paragraph of "Point I" of respondent's brief, page 3, that "the innocence or criminality of an act must be determined by the law as it stands at the time it is committed;" while we dissent from the next, that "an act cannot be converted into a crime by a subsequent act [of the party]

nor can a statute give such an effect to a subsequent act." Almost any act or series of acts may be made criminal and *malum prohibitum* by statute, whether *malum per se* or not.

A law is *ex post facto* only as to events which have transpired before its enactment. (Fletcher *v.* Peck, 6 Cranch, 138.)

Whatever other objection may lie to this statute, it is not obnoxious to the charge of being *ex post facto* within any recognized definition of this phrase.

If the statute has been passed between the obtainment of the goods by Fox and the filing of his petition, it would then have been *ex post facto* as to an essential ingredient of the crime, and he would not have been liable to indictment.

The lack of authority to support respondent's position is confessed by his attempt to make United States *v.* Hall, 6 Cranch, 171, serve that purpose. This court there said that Congress *did* not make certain facts work a forfeiture; not that it *could* not have done so; and that the facts proved did not bring the case within the terms of the statute construed.

II.

Doubtless the statute was passed with the full belief that a man obtaining goods upon credit by false pretenses, and committing acts exposing him to be proceeded against in bankruptcy within three months thereafter, must have obtained them in contemplation of bankruptcy, though it might be difficult to prove this directly. (United States *v.* Pusey, 6 Bank. Reg., 291.) Such was the consideration which led the Connecticut legislature to make it criminal to acquire the reputation of keeping a place where liquors were sold without a license. (State *v.* Morgan, 40 Conn., 46.)

III.

The English statute was not referred to as showing the *necessity* for such legislation, but only that it came legitimately within the purview of laws relating to or establishing a uniform system of bankruptcy. The *necessity* for legislative action is to be judged of by Congress; the constitutionality of it, when taken, is for this court. McCulloch *v.* Maryland, 4 Wheat., 421–423.

It cannot justly "be observed that the English act does not punish the fraud in question when committed by one not a bankrupt at the time" (respondent's brief, 6, middle), if "the time" referred to is that at which he obtains the goods by false pretenses; for it contemplates a subsequent decree, (it may be nearly three months later), which only declares the bankruptcy of the party at its own date, and not at any prior date. So, under that act as well as ours, the respondent may or may not have been in fact in a condition or contemplation of bankruptcy when he obtained the goods by false pretenses. The word bankrupt in their law is the equivalent of person in ours, so far as his *status* at the time of obtaining the goods is concerned, though possibly its use might require the adjudication, instead of the mere filing of the petition, to precede the indictment.

The Stat. 32 and 33 Vict., c. 62, § 11, says, "any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement," &c.

This, however, is a mere matter of legislative discretion. Power to make the adjudication an element of the offense or a condition precedent to its prosecution, implies a like power to make the filing of the petition such element or condition.

IV.

It is no novelty for the legislature to declare that certain acts and determinations shall be conclusive or, at least, *prima-facie* evidence of a particular state of facts. (People *v.* Mitchell, 45 Barb., 208; Hand *v.* Ballou, 12 N. Y. (2 Kern.), 541; Hickox *v.* Tallman, 38 Barb., 608; Howard *v.* Moot, 64 N. Y., 262; Com. *v.* Williams, 6 Gray, 1; Delaplaine *v.* Cook, 7 Wisc., 54; Abbott *v.* Lindenbower, 42 Mo., 162, and 46 Mo., 291; Allen *v.* Armstrong, 16 Iowa, 508; Fales *v.* Wadsworth, 23 Maine, 555; Rich *v.* Flanders, 39 N. H., 323; Lumsden *v.* Cross, 10 Wisc., 289; Cooley's Const. Lims. (Fed.), 367, and cases cited.)

V.

It is not perceived how a statute regulating the evidence, or declaring an act a crime against Federal law, deprives a party of his right to a trial by jury; nor why an act may not be punished if done within three months of a petitioning in bankruptcy, just as it is a distinct offense to do acts by night (such as distilling, unloading certain vessels, &c.) which are innocent if done by day; and as it is an aggravation of many offenses if done after dark.

The gist of the whole thing, however, is that Congress has a right to declare a certain combination of circumstances criminal.

EDWIN B. SMITH,
Assistant Attorney-General.

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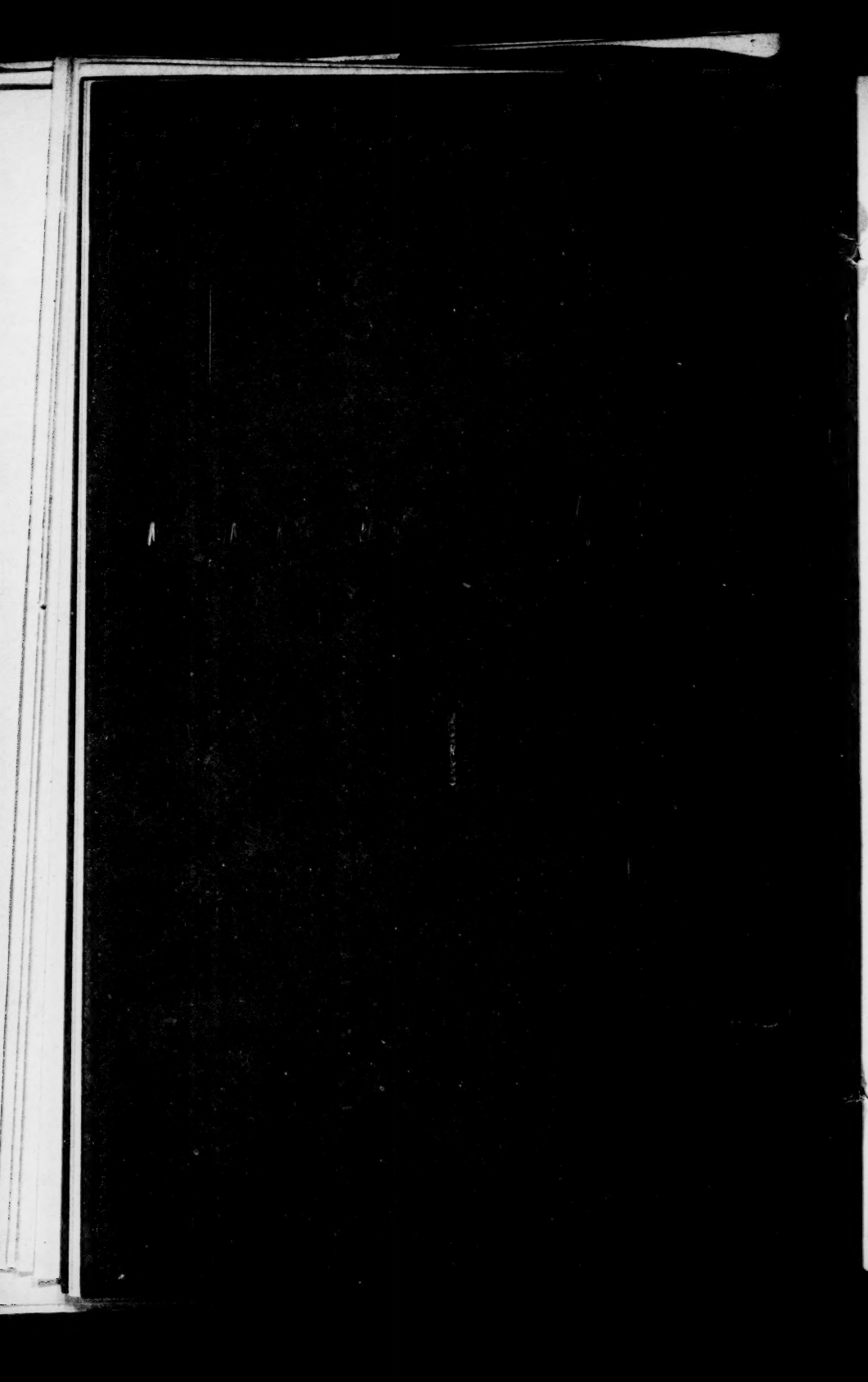

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

UNITED STATES
v
LEWIS FOX. } No. 995.

FROM CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK UPON DIVISION OF OPINION.

BRIEF FOR THE DEFENDANT.

STATEMENT.

This case comes before the Court upon a certificate of division made by the Judges of the Circuit Court, for the Southern District of New York.

The defendant, Fox, was indicted in the Circuit Court, for the Southern District, charged with having violated the 9th subdivision of § 5132, of the Revised Statutes.

The section reads as follows:

"Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor."

First. Who secretes or conceals any property belonging to his estate; or * * * * *

Ninth. Who, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels, with intent to defraud,

* * * * shall be punishable by imprisonment, with or without hard labor, for not more than three years."

Fox was a merchant doing business in the city of New York.

On the 10th day of November, 1874, he filed a voluntary petition in bankruptcy.

On the 6th day of March, 1876, he was indicted in the Circuit Court for the Southern District of New York, charged with having within three months previous to the commencement of proceedings in bankruptcy against him, purchased goods of several merchants on credit, upon the pretence and representation that he was a clothier, carrying on business and dealing in the ordinary course of trade. Whereas he was not carrying on business in the ordinary course of trade, but was disposing of a portion of the goods purchased by him in the auction rooms of the city of New York.

The defendant was convicted; a motion in arrest of judgment was made and after argument the judges, being opposed, certify to this Court the constitutionality of the subdivision of § 5132 of the Revised Statutes, relating to proceedings in bankruptcy, stating the question as follows:

"Where a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods on credit by false pretenses, and if subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for

such transaction, considered in connection with the proceedings in bankruptcy."

POINT I.

Congress has no power to subject a person to punishment for an act or "transaction which at the time of its occurrence is not a violation of any law of the United States."

There is no unwritten criminal code to which resort can be had to spell out an offence against the United States; to constitute an offence against the United States the act complained of must be forbidden by some statute in existence at the time it was committed.

The innocence or criminality of an act must be determined by the law as it stands declared at the time it is committed. An act cannot be converted into a crime by a subsequent act, nor can a statute give such an effect to a subsequent act.

Ex post facto laws are expressly prohibited.

An Ex post facto law is defined to be an act which imposes a punishment for an act which was not punishable at the time it was committed.

Calder vs. Bull, 3 Dallas 386.
Cummings vs. Missouri, 4 Wall. 277.

A statute which by its operation makes that criminal or penal, which was not so when the action was per-

formed is *Ex post facto* within the meaning of the Constitution.

3d (Pa), 1809 U. S. vs. Hall.
2d Wash. C. Ct., 366.
Affirmed 6 Cranch 171.

A law which alters the character or quality of an act by something that occurs afterwards, so as to make an antecedent innocent act criminal by relation, is in principle and effect an *ex post facto* law.

It is immaterial whether this result is reached by a statute passed subsequent to the occurrence, or whether the result be worked out by operation of a statute which gives a retrospective effect to subsequent acts. In the one case the end is effected directly, in the other by indirection.

It is well said by this court in Cummings vs. Missouri, (4 Wall, 325) that "The Constitution deals with substance not shadows.

The inhibition was leveled at the thing, not the name.

"It intended that the rights of the citizens should be secure against deprivation for past conduct by legislative enactment under any form however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." * * *

"The provision of the Federal Constitution intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted."

A law which attempts to make the innocence or crim-

inality of conduct dependant upon the future action of the citizen violates the first principles of the social compact and is more dangerous to civil liberty than an act which directly assumes to punish as criminal acts which were not criminal when committed.

POINT II.

Under the power to establish uniform laws on the subject of Bankruptcies, Congress cannot draw to itself the right to punish all acts committed by persons who afterwards become bankrupts. An act to be criminal and within the jurisdiction of the United States must have some proper relation to the bankruptcy.

"The subject of bankruptcies," as used in the Constitution has reference to the relation which exists between a debtor unable or unwilling to pay his debts in full, and his creditors. Over this relation Congress has full control. It may declare what acts shall constitute acts of bankruptcy, and may define the rights and duties of the bankrupt and his creditors. And may undoubtedly not only punish fraudulent bankruptcy, but may protect creditors against fraudulent acts committed in contemplation of bankruptcy.

The statute under consideration is not limited in its application to those bankrupt at the time, but extends to any person who may become a bankrupt within three months next following the act.

It nowhere requires that the act shall be done in contemplation of bankruptcy.

POINT III.

The necessity for such a provision in a bankrupt law has been argued from the existence of what is assumed to be a similar provision in the English act. But in this respect the two acts are entirely dissimilar.

The English act is restricted to the punishment of frauds committed by persons who are bankrupts at the time. While the act of Congress contains no such limitation, but extends to all persons who may become bankrupts.

> English Debtors' Act, 1869, sec. 11. Subsections 13, 14 and 15.

It will be observed that the English Act does not punish the fraud in question when committed by a person not a bankrupt at the time, although the Act may be committed in contemplation of bankruptcy. The section of the English Act from which subdivision 9th of our act is copied, uses the word "bankrupt" and the act defines "a bankrupt" to mean one who has been adjudged a bankrupt. (24th & 25th Vict. C. 134, § 229.)

If such a person obtains credit with intent to defraud by falsely representing that he is again engaged in business, and dealing according to the usual course of trade he is liable to punishment; the object of this provision is to protect the community against frauds committed by adjudged bankrupts. Our statute does not require that the accused should be a

bankrupt or a debtor even at the time of obtaining the credit.

The change made by the Revised statutes is worthy of notice. In the original bankrupt act the words used are "Every debtor or bankrupt, respecting whom," etc. Bankrupt Act of 1867 § 44. The language of the Revised Statutes is, "Every person respecting whom," etc. While the English act as above stated employs only the word "bankrupt."

POINT IV.

The ninth subdivision of § 5132 does not appear by any reported case to have been the subject of adjudication.

The eighth subdivision of the original act was considered by Judge Longyear, in United States vs Pussey, reported in 6th Bank. Reg. 284. The grounds upon which the decision of Judge Longyear rests may be claimed to be sufficient to sustain the ninth subdivision. It is proper, therefore, to consider the argument by which the eighth subdivision was sustained.

In the United States vs. Pussey, 6th Bank. Reg., page 291, the court say:

"Suppose Congress in lieu of the present form of expression, provided that in order to constitute the specified act an offence, it should be committed by a debtor contemplating or in contemplation of bankruptcy;" but he continues, "is not this the form and effect of the provision as it now stands?

To this question we submit that a negative answer must be given.

Had this been the "form and effect" of the provision, the accused would be entitled to show in defence that at the time he committed the act, he did not contemplate bankruptcy.

And if he satisfied the jury of this fact he would be entitled to an acquital. He could have shown, if such were the fact that he was solvent, and the question of guilt or innocence would be submitted to the determination of the jury upon the evidence as to the intent.

This the Judge admits, for he adds: "If Congress had so enacted it would have been left to courts and juries to determine what would constitute proof of contemplation of bankruptcy. Like all other questions of the intent or animus of the acts and conduct of the persons, it would very rarely admit of direct proof, but in most cases would depend on circumstantial evidence. *

* * * * *

But this leaves the matter to depend largely upon the uncertain and varying opinions of different judges and juries, an element which ought not to exist in penal enactments, Congress has therefore seen fit in the enactment in question, to withold this question from courts and juries, and by express enactments to establish a rule as to the time, which, shall be at once uniform and conclusive. * * * *

If the debtor commits the act specified, and at any time commits an act, on account of which he is liable to be declared by the court to be a bankrupt, he is, as we have seen, *conclusive presumed* to have committed the

act in contemplation of committing an act of bankruptcy, and the offense is complete upon committing the former act, whether proceedings for adjudication of bankruptcy are commenced within three months or not except in the single instance where the act of bankruptcy is the commencement of such proceedings of the debtor.

POINT V.

The statute as construed by Judge Longyear violates those provisions of the constitution, which secures to every person accused of crime against the United States the right of trial by jury.

"The trial of all crimes, except in cases of impeachment, shall be by a jury." "No person shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of a grand jury, * * nor be deprived of life, liberty or property except by due process of law."

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, * * * * * and to be informed of the nature and cause of the accusation; to be cofronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

Article 3d, § 2 of the Constitution.
Articles 5th and 6th of the amendments.

It has never, we believe, been seriously questioned that the effect of these provisions of the constitution is to secure to ever person accused of crime the right of a trial by jury, according to the course of the common law.

He is entitled to the presumption of innocense which the common law in its charity accords to every person accused of crime. Wherever the rules of the common law prevail no person can be required to prove his innocence, but the burden of establishing guilt is upon the prosecution, and guilt must be established by the evidence of witnesses and not by acts of congress. When the criminality of an act depends upon the intent or animus with which it was committed, the question of intent is always one of fact for the determination of a jury.

Upon this question the defendant has a right to introduce any evidence which in the opinion of the court tends to disprove a criminal intent.

It is true, as remarked by Judge Longyear, that this leaves the matter to depend upon the uncertain and varying opinions of different judges and juries, an element, which the learned judge thinks ought never to exist in penal statutes. But as much as this slight imperfection in the administration of human justice may be regretted it is, we think, greatly to be preferred to statutory declarations of intent, which are to be "at once uniform and conclusive," upon the guilt of the accused.

We submit that Congress has no power to declare by legislative enactment that any fact shall be conclusive of a criminal intent, much less has it power to declare in a criminal case that a subsequent act shall be conclusive evidence that a prior act was committed with a particular intent.

Evidence it may be, but not conclusive. The accused must be left free to explain, if he can, his subsequent conduct, and to show it to be consistent with innocence.

POINT VI.

The effect of general language in a statute cannot be modified by interpolating restrictive language nowhere found in the act.

In the statute under consideration there is no language which can be held to require or permit the judge to submit to the jury the question whether the act done by the defendant was done in contemplation of bankruptcy.

POINT VII.

The obtaining goods by the accused upon credit did not and could not work a fraud upon his creditors generally. The only person defrauded was the seller of the goods. The fact that a person who commits such a fraud subsequently becomes bankrupt does not make his act of fraud an offense against the United States. The antecedent act of fraud has no proper relation to the subsequent act of bankruptcy. No such relation is required by the act to constitute the offense. The guilt of the accused is made to depend upon two facts, a fraudulent purchase and subsequent bankruptcy. These being proved or admitted his guilt follows by a rule of evidence made conclusive by statute.

If false pretenses can be made an offense against the United States, why not larceny?

With more propriety could punishment be inflicted on one who should steal the property of another against whom proceedings in bankruptcy should be commenced within three months after the larceny. The thief certainly diminishes the estate and injures the creditors. But he who obtains property by false pretenses and then becomes a bankrupt, benefits all his creditors save the one who who sold him the property.

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